

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THERESA SHORTMAN, individually and as the
representative of a class of similarly-situated
persons,

Plaintiff,

vs.

MULTICARE HEALTH SYSTEM, a Washington
corporation,,

Defendant.

Civil Action No. 3:20-cv-05615

PROTECTIVE ORDER

**Note on Motion Calendar:
September 8, 2020**

The parties, by and through their undersigned counsel of record, hereby stipulate to entry of the following protective order.

1. PURPOSES AND LIMITATIONS

This action involves claims that one or more non-party companies engaged by defendant MultiCare Health System illegally placed automated SMS messages (text messages) to plaintiff's and other persons' cell phones. Discovery in this action is likely to involve production of confidential, private or proprietary information for which special protection may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this agreement is consistent with LCR 26(c). It does not confer blanket protection on all disclosures or responses

STIPULATED MOTION AND (PROPOSED)
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1 to discovery, the protection it affords from public disclosure and use extends only to the limited
2 information or items that are entitled to confidential treatment under the applicable legal
3 principles, and it does not presumptively entitle parties to file confidential information under
4 seal. This agreement and order also does not require any party or person to produce information
5 or records not properly subject to discovery under the Federal Rules of Civil Procedure or
6 applicable privileges.

7 2. “CONFIDENTIAL” MATERIAL

8 “Confidential” material shall include the following documents and tangible things
9 produced or otherwise exchanged: records concerning Defendant’s patients, including
10 information and records containing non-public financial, medical, or other personal information
11 of any party or individual, as well as information that constitutes a trade secret of any party or
12 person. “Confidential” material may include “protected health information” as defined in 45
13 C.F.R. § 160.103 and 164.501. This Order is a Qualified Protective Order complying with 45
14 C.F.R. §164.512(e)(1)(v)(A) and (B) and authorizing disclosure of protected health information
15 pursuant to 45 C.F.R. §164.512(e)(1)(iv)(A).

16 3. SCOPE

17 The protections conferred by this agreement cover not only confidential material (as
18 defined above), but also (1) any information copied or extracted from confidential material; (2)
19 all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony,
20 conversations, or presentations by parties or their counsel that might reveal confidential
21 material.

22 However, the protections conferred by this agreement do not cover information that is
23 in the public domain or becomes part of the public domain through trial or otherwise.

1 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

2 4.1 Basic Principles. A receiving party may use confidential material that is
3 disclosed or produced by another party or by a non-party in connection with this case only for
4 prosecuting, defending, or attempting to settle this litigation. Confidential material may be
5 disclosed only to the categories of persons and under the conditions described in this agreement.
6 Confidential material must be stored and maintained by a receiving party at a location and in a
7 secure manner that ensures that access is limited to the persons authorized under this agreement.

8 4.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
9 ordered by the court or permitted in writing by the designating party, a receiving party may
10 disclose any confidential material only to:

11 (a) the receiving party's counsel of record in this action, as well as
12 employees of counsel to whom it is reasonably necessary to disclose the information for this
13 litigation;

14 (b) the officers, directors, and employees (including in-house counsel) of the
15 receiving party to whom disclosure is reasonably necessary for this litigation, unless the parties
16 agree that a particular document or material produced is for Attorney's Eyes Only and is so
17 designated;

18 (c) experts and consultants to whom disclosure is reasonably necessary for
19 this litigation and who have signed the "Acknowledgment and Agreement to Be Bound"
20 (Exhibit A);

21 (d) the court, court personnel, and court reporters and their staff;

22 (e) copy or imaging services retained by counsel to assist in the duplication
23 of confidential material, provided that counsel for the party retaining the copy or imaging

1 service instructs the service not to disclose any confidential material to third parties and to
2 immediately return all originals and copies of any confidential material;

3 (f) during their depositions, witnesses in the action to whom disclosure is
4 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”
5 (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of
6 transcribed deposition testimony or exhibits to depositions that reveal confidential material may
7 not be disclosed to anyone except as permitted under this agreement;

8 (g) the author or recipient of a document containing the information or a
9 custodian or other person who otherwise possessed or knew the information; and

10 (h) Putative Class Members only if the Confidential Material is about that
11 putative class member.

12 4.3 Filing Confidential Material. Before filing confidential material or discussing or
13 referencing such material in court filings, the filing party shall confer with the designating party,
14 in accordance with Local Civil Rule 5(g)(3)(A), to determine whether the designating party will
15 remove the confidential designation, whether the document can be redacted, or whether a
16 motion to seal or stipulation and proposed order is warranted. During the meet and confer
17 process, the designating party must identify the basis for sealing the specific confidential
18 information at issue, and the filing party shall include this basis in its motion to seal, along with
19 any objection to sealing the information at issue. Local Civil Rule 5(g) sets forth the procedures
20 that must be followed and the standards that will be applied when a party seeks permission from
21 the court to file material under seal.

1 5. DESIGNATING PROTECTED MATERIAL

2 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
 3 party or non-party that designates information or items for protection under this agreement must
 4 take care to limit any such designation to specific material that qualifies under the appropriate
 5 standards. The designating party must designate for protection only those parts of material,
 6 documents, items, or oral or written communications that qualify, so that other portions of the
 7 material, documents, items, or communications for which protection is not warranted are not
 8 swept unjustifiably within the ambit of this agreement.

9 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
 10 shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to
 11 unnecessarily encumber or delay the case development process or to impose unnecessary
 12 expenses and burdens on other parties) expose the designating party to sanctions.

13 If it comes to a designating party's attention that information or items that it designated
 14 for protection do not qualify for protection, the designating party must promptly notify all other
 15 parties that it is withdrawing the mistaken designation.

16 5.2 Manner and Timing of Designations. Except as otherwise provided in this
 17 agreement (see, *e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or
 18 ordered, disclosure or discovery material that qualifies for protection under this agreement must
 19 be clearly so designated before or when the material is disclosed or produced.

20 (a) Information in documentary form: (*e.g.*, paper or electronic documents
 21 and deposition exhibits, but excluding transcripts of depositions or other pretrial or trial
 22 proceedings), the designating party must affix the word "CONFIDENTIAL" to each page that
 23 contains confidential material. If only a portion or portions of the material on a page qualifies

1 for protection, the producing party also must clearly identify the protected portion(s) (*e.g.*, by
2 making appropriate markings in the margins).

3 (b) Testimony given in deposition or in other pretrial proceedings: the
4 parties and any participating non-parties must identify on the record, during the deposition,
5 hearing, or other pretrial proceeding, all protected testimony, without prejudice to their right to
6 so designate other testimony after reviewing the transcript. Any party or non-party may, within
7 fifteen days after receiving the transcript of the deposition or other pretrial proceeding,
8 designate portions of the transcript, or exhibits thereto, as confidential. If a party or non-party
9 desires to protect confidential information at trial, the issue should be addressed during the pre-
10 trial conference.

11 (c) Other tangible items: the producing party must affix in a prominent place
12 on the exterior of the container or containers in which the information or item is stored the word
13 “CONFIDENTIAL.” If only a portion or portions of the information or item warrant protection,
14 the producing party, to the extent practicable, shall identify the protected portion(s).

15 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
16 designate qualified information or items does not, standing alone, waive the designating party’s
17 right to secure protection under this agreement for such material. Upon timely correction of a
18 designation, the receiving party must make reasonable efforts to ensure that the material is
19 treated in accordance with the provisions of this agreement.

20 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

21 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
22 confidentiality at any time. Unless a prompt challenge to a designating party’s confidentiality
23 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic

1 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
 2 challenge a confidentiality designation by electing not to mount a challenge promptly after the
 3 original designation is disclosed.

4 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
 5 regarding confidential designations without court involvement. Any motion regarding
 6 confidential designations or for a protective order must include a certification, in the motion or
 7 in a declaration or affidavit, that the movant has engaged in a good faith meet and confer
 8 conference with other affected parties in an effort to resolve the dispute without court action.
 9 The certification must list the date, manner, and participants to the conference. A good faith
 10 effort to confer requires a face-to-face meeting or a telephone conference.

11 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
 12 intervention, the designating party may file and serve a motion to retain confidentiality under
 13 Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of
 14 persuasion in any such motion shall be on the designating party. Frivolous challenges, and those
 15 made for an improper purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on
 16 other parties) may expose the challenging party to sanctions. All parties shall continue to
 17 maintain the material in question as confidential until the court rules on the challenge.

18 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
 19 LITIGATION

20 If a party is served with a subpoena or a court order issued in other litigation that
 21 compels disclosure of any information or items designated in this action as
 22 “CONFIDENTIAL,” that party must:

(a) promptly notify the designating party in writing and include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this agreement. Such notification shall include a copy of this agreement; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the designating party whose confidential material may be affected.

8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential material to any person or in any circumstance not authorized under this agreement, the receiving party must immediately (a) notify in writing the designating party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this agreement, and (d) request that such person or persons execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a producing party gives notice to receiving parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in an e-discovery order or agreement that provides for production without prior privilege review. The parties shall confer on an appropriate non-waiver order under Fed. R. Evid. 502.

10. NON TERMINATION AND RETURN OF DOCUMENTS

Within sixty (60) days after the termination of this action, including all appeals, each receiving party must return all confidential material to the producing party, including all copies, extracts and summaries thereof. Alternatively, the parties may agree upon appropriate methods of destruction.

Notwithstanding this provision, counsel are entitled to retain one archival copy of all documents filed with the court, trial, deposition, and hearing transcripts, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain confidential material.

The confidentiality obligations imposed by this agreement shall remain in effect until a designating party agrees otherwise in writing or a court orders otherwise.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

DATED: September 8, 2020

ANDERSON + WANCA

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1 DATED: September 8, 2020

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14 PURSUANT TO STIPULATION, IT IS SO ORDERED

15 IT IS FURTHER ORDERED that the parties shall confer on an appropriate non-waiver
16 order under Fed. R. Evid. 502.

17 DATED: October 7, 2020


18 
19 _____
20 John C. Coughenour
21 United States District Court Judge
22
23

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty
of perjury that I have read in its entirety and understand the Stipulated Protective Order that
was issued by the United States District Court for the Western District of Washington on
_____ [date] in the case of *Shortman v. MultiCare Health System*, Case Number No. 3:20-cv-
05615-JCC. I agree to comply with and to be bound by all the terms of this Stipulated Protective
Order and I understand and acknowledge that failure to so comply could expose me to sanctions
and punishment in the nature of contempt. I solemnly promise that I will not disclose in any
manner any information or item that is subject to this Stipulated Protective Order to any person
or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Western District of Washington for the purpose of enforcing the terms of this Stipulated
Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____